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NOS. 82-585 and 82-586

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALOHA AIRLINES, INC., Appellant,
v.
DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee.

HAWAIIAN AIRLINES, INC., Appellant,
v.
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII, Appellee.

REPLY BRIEF FOR APPELLANT HAWAIIAN AIRLINES, INC.

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ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF HAWAII

REPLY BRIEF FOR APPELLANT HAWAIIAN AIRLINES, INC.

This Reply Brief is submitted on behalf of Hawaiian Airlines, Inc. ("Hawaiian") in response to the Brief of the Director of Taxation of the State of Hawaii (the "Director"), and the Briefs submitted as amici of the Director by the States of Alaska, Arizona, Oklahoma, Washington and West Virginia (the "States"), the Multistate Tax Commission (the "MTC") and participating states and the State of New York ("N.Y.").

SUMMARY OF REPLY ARGUMENT

A statute of the United States, 49 U.S.C. § 1513, provides that no state may levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom. The states may levy and collect taxes such as property taxes, net income taxes, franchise taxes and sales or use taxes, so long as such taxes are not levied or collected on the gross receipts from any of the above-listed activities or on any of such activities. 49 U.S.C. § 1513(b).[1] The Hawaii public service company tax (the "PSC tax") is assessed against Hawaiian and collected at the rate of 3% of the gross receipts derived by Hawaiian from the above-listed activities. It is therefore specifically prohibited by 49 U.S.C. § 1513(a).

The Director makes several principal arguments in support of his position that the PSC tax is not prohibited. First, as the Director has stated the issue in framing the "question presented" in his "Motion to Dismiss or Affirm", page 1:

> Whether a Hawaii tax is a property tax or a gross receipts tax. If it is a property tax, it is expressly permitted by 49 U.S.C. 1513(b); and if it is a gross receipts tax, it is expressly prohibited by 49 U.S.C. 1513(a).

Hawaiian's reply is simply stated. If the PSC tax is a gross receipts tax, which it must be because it is a tax of 3% of gross income, then even the Director acknowledges that it is prohibited. Even if the PSC tax is characterized as a property tax, it is nevertheless not permitted by 49 U.S.C. § 1513(b) because it is levied and collected on the gross receipts of Hawaiian from the above-listed

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[1] These conclusions are confirmed by the courts of all the states which have considered the matter to date (Alaska, Arizona and New York) and one state attorney general's opinion (Ohio), the only exception being the Hawaii decision at issue in this case. *See Wien Air Alaska v. State Dep't of Revenue*, No. 3 AN 818582 Civ. (Alaska Super. Ct., 3d Dist., May 6, 1983); *State v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (Ariz. Ct. App. 1980); *Air Transport Ass'n v. New York State Dep't of Taxation and Fin.*, 91 A.D. 2d 150, 169, 458 N.Y.S.2d 709 (N.Y. App. Div. 1983), *aff'd*, No. 326 (N.Y. June 28, 1983); Ohio Op. Att'y Gen. No. 73-117 (1973).

activities and, therefore, expressly prohibited by 49 U.S.C. § 1513(a).

Second, another principal premise of the Director's argument is that the prohibition contained in 49 U.S.C. § 1513(a), when applied to prohibit the imposition of the PSC tax, "produces discriminatory, illogical, and inequitable results that were not intended by Congress and which are not supported by the voluminous legislative history." Director's Brief, hereinafter cited as "Dir. Br.", at 27. Based upon this premise, the gist of the Director's argument is that the Court should (1) remedy these perceived defects by excising from Section 1513(a), through statutory interpretation, any tax prohibition except "head taxes" of states and their political subdivisions (Dir. Br. at 34) and (2) hold that the PSC tax as applied to the gross income of Hawaiian from the carriage of persons by air between airports on the islands of the State of Hawaii over international waters ("Hawaiian's Passenger Revenues") is not a "head tax" because it is "reasonably characterized as a property tax".[2] In an attempt to support this position, the Director makes a series of specious arguments regarding the proper statutory construction of 49 U.S.C. § 1513. In addition, the Director sets forth a distorted interpretation of the legislative history of the statute to support his contention that Congress did not intend the broad prohibition contained in the statutory language.

The prohibition in Section 1513(a) is a keystone of the Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 87 Stat. 88, in which it was included. The Director makes no mention of the substantial financial benefits which the State of Hawaii has received

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[2]The Director recognizes that a "head tax" may be a "percentage of fare tax" and "an indirect tax imposed upon the airline but ultimately paid by the passenger" (Dir. Br. at 13 n.5). This is also acknowledged in the MTC Brief at 11 n.13 and at 16. The PSC tax is a "percentage of fare tax" imposed upon Hawaiian based on the carriage of persons in "air commerce" and the sale of "air transportation" (*i.e.*, in this case 3% of the gross income from the passenger's fare). Since the tax is on the gross amount of or gross receipts from the passenger's fare, it must be paid by the passenger in order for the airline to recover the full amount of the fare. In this case there is no dispute that the terms "gross receipts" and "gross income" are synonymous. Dir. Br. at 7 n.2, MTC Br. at 8 n.10; Joint Appendix (hereinafter cited as "J.A.") at 15-16, ¶ 5. Thus, the PSC tax is a prohibited "head tax" under the Director's definition.

pursuant to that Act.[3] In light of these substantial benefits, the prohibition in Section 1513(a) is neither illogical nor inequitable and it does not result in any constitutionally proscribed form of discrimination. Furthermore, an examination of the Director's "rules" of statutory construction reveals that they are either inapplicable or erroneously applied and, in either event, presented in an apparent attempt to obscure the plain meaning of the federal statute. Finally, a complete reading of applicable legislative history demonstrates that the broad prohibition in 49 U.S.C. § 1513 of taxes such as the PSC tax was intended.

ARGUMENT

1. THE TERMS OF 49 U.S.C. § 1513

A. Subsection (a).

Subsection (a) of Section 1513 by its plain and unambiguous terms prohibits a state from levying or collecting:

> . . . a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . . .

Neither the Director nor any of the amici contends that there is any ambiguity in the terms of the prohibition in subsection (a) of Section 1513. Rather, the Director and amici contend that the terms of subsections (b) and (c) of Section 1513 make the plain language and terms of subsection (a)'s prohibition ambiguous, because of exceptions or exemptions in subsection (b) and because of the temporary exemption in subsection (c). *See, e.g.*, Dir. Br. at 30, 47; States Br. at 14, 15, 16; N.Y. Br. at 4. However, there is no ambiguity.

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[3] For the period including fiscal years ending 1971 to 1973, federal grants for airport and airway development in Hawaii amounted to $6,114,000 or an average of $2,038,000 per fiscal year. For the period including fiscal years ending 1974 to 1978, after enactment of 49 U.S.C. § 1513, federal grants for airport and airway development in Hawaii amounted to $47,682,000, or an average of $9,536,400 per fiscal year. J.A. at 20, ¶ 16.

B. **Subsection (b).**

Subsection (b) of Section 1513, as it relates to permissible state taxes and fees, provides:

> [1] Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes . . . (emphasis added)
>
> and
>
> [2] . . . nothing in this section shall prohibit a State . . . from levying or collecting reasonable rental charges, landing fees, and other service charges . . . .

The terms of these two clauses of subsection (b) are parallel with one critical difference. The phrase "other than those enumerated in subsection (a) of this section" applies to taxes but not to "*reasonable* rental charges, landing fees, and other service charges."[4] (Emphasis added.)

The phrase "taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes" contained in subsection (b) does not create ambiguity between subsections (a) and (b) as contended. In fact, it eliminates the possibility of any such ambiguity. The phrase is an exception to the listing of taxes in subsection (b) which confirms that subsection (b) approves taxes only when they are not enumerated in subsection (a). The phrase is not in any sense, as contended by the Director, an exception to the prohibition in subsection (a). Accordingly, a property tax measured by a percentage of the fair market value of the property would not be prohibited but a property tax measured by gross receipts from the carriage of passengers or sale of air transportation [a tax enumerated in subsection (a)] would be.

The claimed ambiguity in or exception to the prohibition of *state taxes* in subsection (a), allegedly created by subsection (b), is a

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[4]Thus, a state may collect rental charges, landing fees and other service charges based on airline gross receipts provided they are "reasonable". *Island Aviation, Inc. v. Guam Airport Auth.*, 562 F. Supp. 951, 958 (D. Guam 1982) (memorandum order).

consequence of an improper and fractured reading of subsection (b). This is demonstrated by the assertion in the States Br. (at 15) as follows:

> Subsection (b) states that included in the taxes "other than those enumerated in subsection (a)" are a number of types of generally applicable state business taxes . . . .

Subsection (b) does not list taxes that are included in "taxes other than those enumerated in subsection (a)." Subsection (b) simply states that certain "taxes other than those enumerated in subsection (a)" are permitted, and includes an enumeration of illustrative types of taxes which are so permitted so long as they are not "enumerated in subsection (a)."[5]

Subsection (a) does not control over subsection (b) in all respects, however, and the States are in error in their characterization of the airlines' position (States Br. at 15-16) that:

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[5] The claimed ambiguity created by subsection (b) is described in the States Br. (at 15) as follows:

> Two comparisons of subsections (a) and (b) indicate that the meaning of § 1513 at least is ambiguous.
>
> First, subsection (b) permits sales tax [sic] on the sale of goods or services. Subsection (a) purports to prohibit a tax on the sale of air transportation. This is inherently contradictory in that a sales tax on air transportation is a sales tax on a service.
>
> . . . .
>
> Second, subsection (b) allows franchise taxes or property taxes.

Because subsection (b) permits or allows sales taxes, franchise taxes and property taxes *only* if they are not "enumerated in subsection (a)", *i.e.* not based for instance on gross receipts from air commerce or air transportation, the two subsections are harmonious. An example of a sales tax which is permitted by subsection (b) and not prohibited by virtue of its being enumerated in subsection (a), is a sales tax on food or beverages sold by an airline [*Air Jamaica, Ltd. v. Florida*, 374 So. 2d 575 (Fla. Dist. Ct. App. 1979)] or a sales tax on a service rendered by an airline to another airline for baggage handling, cleaning of aircraft etc.

> . . . the response by the airlines that subsection (a) controls over subsection (b) in all respects flies in the face of another comparison and its history. Subsection (b) exempts from the subsection (a) preemption "rental charges, landing fees, and other service charges ****" This language was added in (b) because industry representatives, including the ATA, recognized that such charges would fall within the prohibition of subsection (a). (Footnote omitted.)

Contrary to the States argument in misstating appellant's position, this "comparison and its history" demonstrates the absence of an exception or ambiguity in subsection (b) with respect to the prohibition of *state taxes*, rather than the existence of one. Under subsection (b), "reasonable rental charges, landing fees and other service charges from aircraft operations for the use of airport facilities" are not subject to the clause "other than those enumerated in subsection (a)." Thus, by the plain terms of subsection (b), the prohibition of subsection (a) controls over subsection (b) with respect to *state taxes* but not with respect to "reasonable rental charges, landing fees or other service charges from aircraft operators for the use of airport facilities." Thus, for example, *reasonable* landing fees measured by gross receipts would be permissible.

C. **Subsection (c).**

Subsection (c) granted a temporary exemption from the provisions of subsection (a) (until December 31, 1973) to any airport operating authority which met three enumerated conditions, namely, an authority which

> (1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;
>
> (2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and
>
> (3) has no authority to collect any other type of tax to repay such loan or loans.

The Director (Dir. Br. at 30 n.33) and the States (States Br. at 16 n. 31) argue that subsection (c) can be read consistently or logically with subsection (a) only if the prohibition in subsection (a) is limited to "head taxes" because otherwise "Congress would be imputed with

the illogical and unwarranted intent to permit head taxes but prohibit all other subsection (a) taxes other than head taxes" (Dir. Br. at 30 n.33). This argument is subject to several infirmities. First, if subsection (a) was to be limited to head taxes, Congress would have so stated, rather than enumerating numerous other types of taxes and charges. Second, subsection (c) does not "permit head taxes," it grants a temporary exemption to an airport operating authority from the prohibition of subsection (a) on several enumerated conditions, only a part of one of which is that the exempted charge is a "head tax". The conditions are that the authority be

> collecting (i) without air carrier assistance, (ii) *a head tax*, (iii) on passengers, (iv) in air transportation, (v) for the use of its facilities. (Parentheses, roman numerals and emphasis added.)

These restrictive conditions in no way imply that subsection (a) is limited to a head tax, any more than they imply that subsection (a) is limited to a prohibition of charges for the use of airport facilities or any of the other enumerated conditions. Finally, a comparison of the language of subsection (c) with that of subsection (a) confirms that Congress could distinguish between a statute applicable to only a head tax (the limited subsection (c) exemption) and one applicable to a broad category of state taxes (the subsection (a) prohibition).[6] This suggests that subsection (a) was intended to prohibit a broad class of state taxes including the PSC tax.

2. STATUTORY CONSTRUCTION OF 49 U.S.C. § 1513 BY THE DIRECTOR AND AMICI

Even if the statutory construction of 49 U.S.C. § 1513 by the Director and amici (including that based on the selective analysis of its legislative history) is accepted at face value, the PSC tax as applied to Hawaiian's Passenger Revenues is prohibited by Section 1513(a).

First, the PSC tax as applied to Hawaiian's Passenger Revenues is a "head tax" as the Director defines it (as discussed in footnote 2) and the Director and amici concede that a state "head tax" is prohibited by Section 1513(a).

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[6]**The language of subsection (c) may explain the position taken in floor debate concerning subsection (c) by Senator Cannon and discussed in States Br. at 23-24 (*i.e.*, subsection (c) as finally drafted may have been intended to apply only to New Hampshire's head tax).**

Second, subsection (a) unquestionably prohibits, among other things, a state tax "on the sale of air transportation or on gross receipts derived therefrom." "Air transportation", as defined in 49 U.S.C. § 1301(10), includes interisland flights in Hawaii.[7] The PSC tax as applied to Hawaiian's Passenger Revenues is a tax on the gross receipts from the sale of air transportation.[8] Nevertheless, the Director concludes (Dir. Br. at 31) that:

> . . . there is no prohibition on taxes or charges on the sale of air transportation in intrastate commerce, which is the sole issue in this case. (Emphasis in the original omitted.)

The Director arrives at this conclusion by ignoring the statutory definition of "air transportation" and making an assumption (Dir. Br. at 31 n.35) as follows:

> It is not reasonable to assume that Congress intended that Section 1513 should be applied to intrastate flights over the Hawaiian islands any differently than to flights in the other forty-nine states.

There is no rule of statutory construction that justifies the disregard of the plain terms of subsection (a) on the basis that it is "not reasonable to assume" that Congress meant what it stated in plain terms. Quite to the contrary, Congress confirmed, in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, that Hawaii interisland flights constitute "interstate or overseas air transportation", by adopting what is now 49 U.S.C. § 1305(b)(2). *See* H.R. REP. NO. 1779, 95th Cong., 2d Sess. 95 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3773, 3805. The States do not join in the Director's assumption or his conclusion. In the States Brief at 17 n. 34 it is stated:

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[7] J.A. at 5, ¶ 5. *Island Airways, Inc. v. CAB*, 352 F.2d 735 (9th Cir. 1965).

[8] J.A. at 15-16, ¶ 5. MTC asserts, without explanation, that "Clearly, the [PSC] tax is not imposed . . . *on the gross receipts derived from the sale of air transportation*." (MTC Br. at 25 n.31). The discussion of the prohibition by the Director (Dir. Br. at 31) and the States (States Br. at 17) as well as by the Appellants and their amici demonstrates that this unexplained assertion is unsupportable.

> . . . a tax on gross receipts (or even measured by gross receipts) would be preempted only if it is on the sale of "air transportation." . . . Though in the instant case before the Court, this definitional test may be met, in many of the *amicus* and other designated states, such as Arizona and Washington, it is not.

Apart from the foregoing, an analysis of the rules of statutory construction applied by the Director and amici further substantiates that the PSC tax on Hawaiian Passenger Revenues is prohibited by the plain terms of Section 1513(a).

A. **The Tenth Amendment.**

The Multistate Tax Commission argues (MTC Br. at 16-17) that "although not raised directly in these cases", the Tenth Amendment "should be considered by this Court in its construction of Section 1513".[9] Apparently, the theory of MTC is that unless the prohibition of Section 1513(a) is limited to "head taxes" or "discriminatory taxes" the prohibition would be unconstitutional under the Tenth Amendment. No one, including MTC, disputes that Congress has the constitutional power to prohibit state taxes with respect to "air commerce" or "air transportation" as defined in 49 U.S.C. §§ 1301(4) and 1301(10), respectively. The Commerce Clause is a specific power granted to the federal government, while the Tenth Amendment is a general reservation to the states of powers not specifically granted to the federal government. Therefore, the Tenth Amendment does not override a federal exercise of a power specifically granted to the federal government in the Commerce Clause.[10]

Thus, Congress is not limited by the Tenth Amendment to the prohibition of specific kinds of state taxes (such as "head taxes" or "discriminatory taxes") with respect to "air commerce" or "air transportation". The scope of prohibition may be determined by

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[9]The States assert (States Br. at 9 n.19): "We incorporate the arguments made by appellee on this issue." The Director has made no such arguments. Only MTC has.

[10]***See Northwestern Electric Co. v. Federal Power Comm'n***, 321 U.S. 119, 125 (1944); ***United States v. Carolene Products Co.***, 304 U.S. 144, 147 (1938). ***See also Evansville-Vanderburgh Airport Authority District v. Delta Airlines***, 405 U.S. 707, 722 (1972); ***Freeman v. Hewit***, 329 U.S. 249, 253 (1946); ***Morgan v. Virginia***, 328 U.S. 373, 378 (1946); ***Southern Pacific Co. v. Arizona***, 325 U.S. 761, 766-67 (1945).

Congress pursuant to power delegated to Congress under the Commerce Clause, subject only to constitutional limits on that power which certainly have not been exceeded in 49 U.S.C. § 1513. Accordingly, the Tenth Amendment does not bear upon the interpretation of the prohibition in 49 U.S.C. § 1513(a).

B. **Federal Preemption.**

The Director asserts, correctly, that it will not be presumed that a federal statute was intended to supersede the exercise of powers by the states unless there is a clear manifestation of intention to do so (Dir. Br. at 29).

This presumption is not, however, a rule of statutory construction that can be applied to emasculate the plain terms of 49 U.S.C. § 1513. In fact, it is the Director and amici who are presuming that Congress did not intend to preempt state taxes that are prohibited by the plain terms of 49 U.S.C. § 1513(a). Arguments with respect to the interpretation of 49 U.S.C. § 1513 premised on claims that state taxes which are prohibited by the plain terms of subsection (a) are not inconsistent with federal policies (*see*, *e.g.*, States Br. at 9-11) or do not duplicate federal taxes (*see*, *e.g.*, Dir. Br. at 12, 32, 35; MTC Br. at 17-19) or are not "discriminatory" (*see*, *e.g.*, Dir. Br. at 8, 12, 13, 36, 43-44; States Br. at 2, 7-9, 12, 22-27), even if such claims are assumed to be correct, are preemption arguments which are not relevant to the meaning of the plain and unambiguous terms of the express prohibition in subsection (a).

Certainly Congress is required to state its intent to preempt state laws clearly and expressly (States Br. at 11-13; N.Y. Br. at 9-11). In this case, it has done so.

C. **The Exemptions of Subsection (b).**

As explained above, subsection (b) of 49 U.S.C. § 1513 by its plain terms exempts "reasonable rental charges, landing fees and other service charges from aircraft operators for the use of airport facilities" from the prohibition of subsection (a). Subsection (b) does not permit, allow or exempt state taxes which are enumerated in subsection (a). The Director and amici construe the phrase in subsection (b) "taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales and use taxes" as permitting, allowing or exempting the enumerated illustrative state taxes (as well as generally applicable state tax laws, generally applicable state business taxes and "nondiscriminatory" state taxes). *See*, *e.g.*, Dir. Br. at 9, 10, 34; States Br.

at 10, 13-16; MTC Br. at 8-10, 19, 25-27; N.Y. Br. at 8-10, 21. This statutory construction of subsection (b) ignores the words in subsection (b) "taxes other than those enumerated in subsection (a)" and violates a cardinal rule of statutory construction that each word in a statute is to be given effect. *See* Hawaiian's Jurisdictional Statement, hereinafter "J.S.", at 13; Hawaiian's Opening Brief, hereinafter "Op. Br.", at 12 n.8. The phrase "taxes other than those enumerated in subsection (a)" is manifestly critical to the meaning of subsection (b). This phrase by its plain terms means that taxes prohibited by subsection (a) (including property taxes, net income taxes, franchise taxes and sales and use taxes if prohibited by subsection (a)) are not permitted, allowed or exempted by subsection (b).

D. **The PSC Tax as a Property Tax.**

The Director argues that the PSC tax as applied to Hawaiian's Passenger Revenues is not prohibited by subsection (a) of Section 1513 because it is a "property tax" expressly "permitted" by subsection (b). Thus the Director states (Dir. Br. at 9):

> It [subsection (b)] expressly permits the states to impose general business and property taxes on airlines, such as property taxes, franchise taxes, net income taxes, and gross receipts taxes.
>
> Admittedly, the PSC Tax is a tax expressly included within subsection (b) because it is reasonably characterized as a property tax. Otherwise, the airlines would not continue to pay this tax less the deductions they claim here.

Subsection (b) by its plain terms does not permit a tax prohibited by subsection (a), no matter how such tax is characterized, including a tax reasonably characterized as a property tax. The Director cites no basis for the purported "admission" that the PSC tax is a "tax expressly included within subsection (b)" (Dir. Br. at 9) because there isn't any.

The Director discusses at some length the "classification" of the PSC tax as a "property tax" by the Hawaii Legislature, Courts and Tax Administrator (Dir. Br. 40-44), all of which is irrelevant. A state tax prohibited by subsection (a) is not permitted under subsection (b) regardless of how it may have been classified by a state legislature or court. A state characterization of a tax cannot be controlling in denying a federal right established by Congress. ***First Agricultural National Bank v. State Tax Commission***, 392 U.S. 339, 347 (1968);

California v. Buzard, 382 U.S. 386, 393 (1966).

It is significant that the Hawaii Supreme Court did not hold that the PSC tax was exempt from the prohibition of 49 U.S.C. § 1513(a) because the PSC tax was classified by Hawaii Courts as a property tax. Rather, the Court held that the application of the PSC tax to Hawaiian's Passenger Revenues was not inconsistent with the purpose of the federal prohibition—a holding which, as is so aptly put in the Brief of the United States (at 6), "ignor[ed] the plain terms of the congressional enactment."

The stipulation with the Director demonstrates the difference between a tax which is prohibited by Section 1513 (a) and a property tax which is not. The State of Hawaii imposes real property taxes for airport system property upon airlines under its airport lease agreements. Hawaiian has paid real property taxes with respect to airport system property (J.A. at 22, ¶ 20) in addition to other real property taxes imposed on Hawaiian's real property (J.A. at 17, ¶ 10). These taxes are not on or measured by gross income or gross receipts.

The PSC tax in both form (as demonstrated by the PSC Tax Return and item 10 of the instructions thereto, J.A. Exhibits D and E) and substance is a tax on gross income. It is not in lieu of property or other taxes except the general excise tax imposed on the gross income of businesses generally. [HAWAII REV. STAT. ch. 237 (1976 & Supp. 1982)]. Section 239-6, HAWAII REV. STAT. (1976), states that the PSC tax is "a means of taxing" personal property of airlines. However, as stated in the dissent below:

> At the present time, . . . Hawaii has no personal property tax as such, and there was none at the time HRS §239-6 was enacted. J.S. App. at A-26.

E. **The Rule of Noscitur a Sociis.**

The Director argues that the rule of *noscitur a sociis* is "significant in interpreting Section 1513" because under this rule the "legislative intent behind a certain word may be established by reference to associated or accompanied [sic] words" (Dir. Br. at 33). The Director applies the rule to the phrase "tax, fee, head charge or other charge" and claims (Dir. Br. at 34) that:

> . . . the *noscitur a sociis* rule demonstrates that Section 1513(a) only prohibits taxes in the category of "head taxes or charges," not a general business tax or property tax like the PSC Tax.

No rule of statutory construction is required to understand the

plain meaning of the words "tax, fee, head charge or other charge". *See* Op. Br. at 10-11; J.S. at 12 n.13. The words "tax, fee" or "other charge" are certainly broader than "head charge"—if Congress had intended to limit subsection (a) to head charge, as alleged, it chose a curious way to do so. Apart from this, the rule of *noscitur a sociis* is applied by the Director to the words "tax, fee, head charge or other charge" not to determine the meaning of these words by associated or accompanying words but to contrive a new phrase that is different from the actual statutory prohibition, *i.e.*, "head taxes or charges".

F. **The Last Antecedent Rule.**

The Director and the States argue that the clause "or on the gross receipts derived therefrom" in the prohibition in subsection (a) means only gross receipts derived from the "sale of air transportation" under the last antecedent rule. (Dir. Br. at 30-31; States Br. at 17 n.34). As stated above, the Director also argues that it is "not reasonable to assume" that the clauses even as so interpreted apply to flights over the Hawaiian islands because this "places form over substance." (Dir. Br. at 31, n.35). Also, as stated above, the States do not join in this assumption, and the assumption is contrary to the federal statute. *See* Op. Br. at 11 n.7.

Under the last antecedent rule relied upon by the Director and the States, a qualifying phrase or clause is to be applied to the words or the phrases immediately preceding the qualifying phrase or clause and is not to be construed as extending to others more remote. *See*, *e.g.*, *United States* v. *Pritchett*, 470 F.2d 455 (D.C. Cir. 1972) (cited in States Br. at 17 n.34).

Under subsection (a) a state tax is prohibited (1) on persons traveling in air commerce or (2) on the carriage of persons traveling in air commerce or (3) on the sale of air transportation or (4) on the gross receipts derived therefrom. The last clause—"or on the gross receipts derived therefrom"—does not qualify (*i.e.*, modify or reduce from a general to a particular or restricted form) any of the preceding three clauses, much less the last antecedent one. That is, the phrase "or on the gross receipts derived therefrom" is by its plain terms a separate and distinct prohibition, not a qualifying one as to any other prohibition. Under its plain terms, the final prohibition, "or on the gross receipts derived therefrom", is in addition to each of the three preceding prohibitions and is not qualified by the words "air transportation" in the last antecedent clause. The argument of the Director and the States that the clause "or on the gross receipts derived

therefrom" is qualified by the words "air transportation" in the last antecedent clause applies the last antecedent rule backwards. That is, the Director and the States argue that the phrase "air transportation" in the last antecedent clause modifies the final clause whereas under the last antecedent rule, if it applies at all, the final clause, if a qualifying clause, modifies the last antecedent clause.

Since the plain terms of subsection (a) do not limit the separate, distinct and final prohibition "or on the gross receipts derived therefrom" to any one of the three preceding prohibitions, that prohibition applies to gross receipts from any of the activities that a state may not tax directly or indirectly under the three preceding prohibitions.

G. **Subject Versus Measure.**

The Director and amici argue that the prohibition in 49 U.S.C. § 1513(a) does not prohibit state general business taxes or property taxes which are measured by gross receipts. *See, e.g.*, Dir. Br. at 29-40; States Br. at 16-17; MTC Br. at 21-25; N.Y. Br. at 4-9, 19-21.

These arguments are premised in part on the proposition stated in sweeping terms by MTC (MTC Br. at 21) as follows:

> A vast difference separates the subject or legal incidence of a tax . . . from the measure of a tax . . . .

As to the matter at issue—the prohibition in 49 U.S.C. § 1513(a)—such a difference, if it exists at all, depends on the language of the federal statute and the intent of Congress.

Because the question here is whether the state tax in question affects a federal statutory immunity, it is clear that for this limited purpose any state's characterization of the state tax in question is irrelevant. *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 347 (1968); *Society for Savings v. Bowers*, 349 U.S. 143, 151 (1955).

Certainly there is nothing in the plain terms of 49 U.S.C. § 1513 which indicates the "vast difference" which MTC suggests. To the contrary, the statute prohibits taxes on certain subjects (passengers traveling, carriage of passengers, sale of air transportation) and a measure (gross receipts derived therefrom). Op. Br. at 11.

Subsection (b) of 49 U.S.C. § 1513, as stated above, does not by its plain terms permit, allow or exempt state taxes prohibited by subsection (a). Further, the prohibition in subsection (a) applies to "gross receipts derived therefrom", "directly or indirectly", and

this clause is not limited by its terms or any rule of statutory construction to "air transportation", but applies to gross receipts from any of the activities that a state may not tax directly or indirectly under the three preceding clauses. Thus, an argument that the PSC tax is a "property" tax and is not prohibited because it is measured by gross income [which for purposes of this case is synonymous with "gross receipts" (J.A. at 15-16, ¶ 5; Op. Br. at 14; J.A. at 36-51)] is contrary to the plain terms of 49 U.S.C. § 1513.

The Director and amici assume that subsection (b) exempts all "property" taxes, including a property tax measured by gross receipts, despite its plain terms to the contrary. Because of this assumed exemption of the subject of the tax ("property"), the Director argues that measuring a property tax by gross receipts is not prohibited by subsection (a). But taxes prohibited by subsection (a), regardless of the subject (*e.g.*, property, franchises, sales), are not exempt under subsection (b) if prohibited by subsection (a). Thus, the subject of a tax so measured was not intended to be material in determining the scope of the prohibition. It would be anomalous, at best, to exempt a tax from the prohibition in subsection (a) based upon the purported subject of the tax when subsection (b) demonstrates that Congress did not intend this to be material.

The lack of any substance in the Director's distinction between subject and measure with respect to the prohibition in subsection (a) is clear from other terms of the prohibition. For example, a state tax "on the carriage of persons in air commerce" is prohibited. By its plain terms this applies to a state tax on the person providing such carriage, *e.g.*, an airline. A tax on an airline has to be measured in some way and if it is measured by the "carriage of persons in air commerce"—such as by the number of persons carried or the percentage of the fares charged—it is, in either case, a tax on the carriage of persons in air commerce levied on and collected from the airline. It would not be permitted under the terms of subsection (b) simply because it was labeled a "property" tax.

Finally, the specific exemption in subsection (b) for the levy or collection of reasonable rental charges, landing fees and other service charges from airport operators confirms that the subsection (a) prohibition reaches a measure of taxes or charges (gross receipts derived from the enumerated activities). This is because state charges levied and collected as reasonable rental charges, landing fees and other service charges for the use of airport facilities would not be charges

on any of the activities enumerated in subsection (a). The subject or incident of such charges would be the use of airport facilities. Such charges would be within the prohibition, if at all, only because of their measure; *e.g.*, measured by gross receipts from the sale of air transportation, the carriage of persons or persons traveling in air commerce, directly or indirectly. But if the prohibitions in subsection (a) do not apply to the measure of a tax or charge, then such an exemption would be superfluous. Accordingly, this express exemption confirms Congressional intent to prohibit certain other taxes and charges, such as the PSC tax, by reference to the measure.

For purposes of determining the constitutionality of a state tax under the Commerce Clause a distinction was once made between the subject of the tax and its measure. *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434 (1959). In fact, this is the only expressed reason the Hawaii legislature characterized the PSC tax as a property tax.[11] This distinction (or "vast difference") was ultimately recognized for what it was—a distinction based upon labels—and abandoned in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The Director and amici urge the resurrection of this discarded distinction.

The distinction between the subject of a tax and its measure was once followed in interpreting Rev. Stat. § 3701 (1878) [current version at 31 U.S.C. § 3124(a) (1983)] prior to its amendment in 1959, prohibiting state taxation of obligations of the United States. *American Bank and Trust Co. v. Dallas County*, 51 U.S.L.W. 5181 (U.S. July 5, 1983). In *American Bank*, however, this Court appeared to criticize this distinction as being "rather formalistic" and lacking any "practical impact" or substantive difference (*id.* at 5183), and refused to apply it in the face of a federal statute which clearly prohibited a state tax. This obsolete distinction would, if applied here, be based upon a premise that the subject of a tax is of controlling significance to the exclusion of its measure. This premise is inappropriate here because the terms of subsection (a) prohibit taxes of subjects and a measure and because the terms of subsection (b) evidence an intent on the part of Congress that this type of distinction should not be material with respect to the prohibition. Also, the plain meaning of 49 U.S.C. § 1513 requires consideration of practical impact in its application, not empty formalism.

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[11] *See* Standing Comm. on Fin., Rep. No. 792 on H.B. No. 57, Hawaii H.R.J., 2d Leg., Gen. Sess. 1963, at 799.

If the Director is allowed to prevail in this case merely by arguing that a state characterization of a tax is effective to destroy an immunity from taxation clearly established by a federal statute, then Section 1513 has been totally emasculated. Any state could characterize any tax as a "property" tax and avoid the federal prohibition in its entirety. Such a result would be particularly gross in this case where the Hawaii characterization of the PSC tax as a property tax is totally artificial.[12]

3. LEGISLATIVE HISTORY

The plain and unambiguous terms of 49 U.S.C. § 1513 make resort to legislative history inappropriate. *See* J.S. at 12 n.13; Op. Br. at 17 n.11. However, the interpretation of 49 U.S.C. § 1513 on the basis of selected portions of its legislative history taken out of context by the Director and amici necessitates a brief response.

The Director discusses the legislative history of the statute at considerable length (Dir. Br. at 11-26) and reaches three conclusions (Dir. Br. at 24-25) as follows:

(1) that Congress was concerned only with taxes "generally characterized in the legislative history as 'head taxes'";

(2) that "[n]othing in the legislative history of Section 1513(a) explains the phrase 'or on gross receipts derived therefrom'";

(3) that "nothing in the Congressional [sic] history of Section 1513 supports *any reason* why the PSC Tax should be held invalid, irrespective of its measure" (emphasis in Dir. Br).

The Director's first conclusion ignores, among other things, a substantial series of specific references to the prohibition of gross receipts taxes in applicable legislative history. There are at least twelve such specific references, which are collected in Appendix A hereto, including the following:

> The committee brings to you a bill which will prohibit the imposition of head taxes or gross receipts taxes by airport

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[12]The PSC tax is not a property tax by its terms or under applicable authorities. *See* Op. Br. Haw. Sup. Ct. 20-24, 26-30, Rec. 202-06, 208-18.

In the House floor debate preceding enactment of the PSC tax, Representative McClung explained "that the bill would put all taxable businesses . . . under one tax statute to get around the problem of inter-state commerce." Hawaii H.R.J., 2d Leg., Gen. Sess. 1963, at 552. As observed in the dissenting opinion of Justice Marumoto of the Hawaii Supreme Court, Hawaii does not have a personal property tax, nor did it have one when the PSC tax was enacted (J. S. App. at A-26).

operators or States. 119 CONG. REC. 13,899 (1973) (statement of Rep. Kuykendall). (Leg. Hist. App. at 168.)

* * *

Our bill of last year did prohibit head taxes, user taxes, gross receipts taxes and other forms of state and local taxation on airline passengers or on the carriage of airline passengers. 119 CONG. REC. 3348 (1973) (statement of Sen. Cannon). (Leg. Hist. App. at 124.)

The Director's second conclusion is erroneous in light of these specific references, and pointless since it ignores the plain and unambiguous terms of the phrase (Dir. Br. at 31-32).

The Director's third conclusion is specious. As aforesaid, the legislative history includes various statements of the reason for the prohibition of taxes such as the PSC tax by 49 U.S.C. § 1513(a) (*i.e.*, protection, directly and indirectly, of the revenue base that was the source of airport and airway trust funds). The 1972 Senate Debate is illustrative.

Finally, Mr. President the committee bill prohibits State and local taxation of air fares. The Commerce Committee and the Congress intended in 1970 to preempt the states and localities from levying such taxes, as taxation on air fares is one of the predominant sources of revenue for the trust fund. 118 CONG. REC. 27,816 (1972) (statement of Sen. Pearson). (Leg. Hist. App. at 78.)

The conclusion of the Director and amici that the prohibition in 49 U.S.C. § 1513(a) which applies to a "tax, fee, head charge, or other charge" means "head taxes" or "user charges" (Dir. Br. at 25; States Br. at 18-22; MTC Br. at 11-16; N.Y. Br. at 14-15) is contrary to its plain terms and is unsupportable on the basis of its legislative history as aforesaid. As detailed in Hawaiian's Jurisdictional Statement (at 13-16), the legislative history clearly demonstrates that "head charges" were *added* to an existing, expanded enumeration of the prohibited taxes in 49 U.S.C. § 1513(a). The addition was in response to the Court's constitutional approval of head taxes in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972). The addition of "head charges" to the prohibition was not intended to limit, and by its plain terms does not limit, the prohibition, but rather expands it.

The Director and amici also argue that the legislative history of 49 U.S.C. § 1513(a) indicates that Congress also intended to prohibit only "discriminatory" state taxes. The basis for this argument is testimony of the Ohio Deputy Tax Commissioner in the legislative history regarding an airlines excise tax of the State of Ohio (Dir. Br.

at 12-14, 35; States Br. at 22-28; MTC Br. at 16-17; N.Y. Br. at 15-18).[13] When Congress has intended to prohibit only "discriminatory" state taxes, it has expressly so provided (*see, e.g.*, 31 U.S.C. § 3124(a) and 49 U.S.C. § 1513(d)), and the prohibition in Section 1513(a) contains no such limitation. In any case, the testimony of the Ohio Deputy Tax Commissioner was to the effect that the Ohio tax was *not* discriminatory but "fair, reasonable, and necessary" and neither "excessive" nor "burdensome". *See* Leg. Hist. App. at 145-46.[14] This testimony was given in conjunction with an unsuccessful effort to have gross receipts taxes, such as the Ohio airlines excise tax, excluded from the prohibition of 49 U.S.C. § 1513(a).

CONCLUSION

The interpretation placed upon the prohibition in 49 U.S.C. § 1513(a) by the Director and amici substantially nullifies its plain and unambiguous terms. The interpretation is not warranted by any rule of statutory construction correctly applied. The interpretation is not supported by the legislative history. The interpretation, if allowed to stand, will open the floodgates of state taxation of air commerce and undermine the federal statutory scheme of taxation and support to airport and airway development.

Respectfully submitted,

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[13] An alternate basis in N.Y. Br. at 17 and States Br. at 26 is a reference to the testimony of Stuart G. Tipton, Chairman, Air Transport Association of America (Leg. Hist. App. 133-41). However, Mr. Tipton characterized the subject Ohio gross receipts tax as discriminatory because it reached revenues already subject to the federal excise taxes, not because the tax applied to airlines only. Leg. Hist. App. at 137.

[14] The Ohio Deputy Tax Commissioner noted that in Ohio most businesses paid both franchise and personal property taxes, that the airlines, although subject to both taxes paid small personal property taxes and that the Ohio tax was enacted to make up for this minimal taxation of airlines by Ohio compared with railroads or the trucking industry. Leg. Hist. App. at 145.

APPENDIX A
Legislative History References to Prohibition of Gross Receipts Taxes

The legislative history of 49 U.S.C. § 1513 includes, among other things, at least twelve (12) specific references to the prohibition of gross receipts taxes. These references are quoted or collected below.

1. COMMITTEE REPORTS

Section 7 of the bill adds a new Section 1113 to the Federal Aviation Act of 1958 prohibiting any tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air transportation or on the carriage of persons in air transportation or on the gross receipts derived therefrom. The bill allows, however, for the continuation of the levy and collection of reasonable rental charges, landing fees, and other service charges for the use of airport facilities. However, State jurisdictions meeting certain criteria established in the bill are given until July 1, 1973 to comply with the prohibition. SENATE COMM. ON COMMERCE, AMENDING THE AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970 AND THE FEDERAL AVIATION ACT OF 1958, S. REP. NO. 12, 93d Cong., 1st Sess. 6 (1973), *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 1434 (Leg. Hist. App. at 111).

Section 7 of the Senate Bill provided for a permanent prohibition against the levy or collection of a tax or other charge on persons traveling in air commerce, or on the carriage of persons so traveling, or on the sale of air transportation or on the gross receipts derived therefrom, by any State or political subdivision thereof (including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, or political agencies of two or more States). CONFERENCE REPORT, AIRPORT DEVELOPMENT ACCELERATION ACT OF 1973, H.R. REP. NO. 225, 93d Cong., 1st Sess. 5 (1973) (Leg. Hist. App. at 182).

See SENATE COMM. ON COMMERCE, AMENDING THE AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970, S. REP. NO. 1005, 92d Cong., 2d Sess. 7 (1972) (Leg. Hist. App. at 65); CONFERENCE

REPORT, AIRPORT DEVELOPMENT ACCELERATION ACT OF 1972, H. REP. NO. 1543, 92d Cong., 2d Sess. 5 (1972) (included in part in Leg. Hist. App. at 93, this statement omitted).

2. FLOOR DEBATES

. . . Finally, our bill prohibits discriminatory State and local taxation on airline passengers and on the gross receipts derived from air transportation. 119 CONG. REC. 18,045 (1973) (statement of Sen. Cannon) (Leg. Hist. App. at 187).

. . . Mr. Speaker, I rise in support of the conference agreement on S. 38, the Airport Development Acceleration Act of 1973.

The House amendment to S. 38 was passed by this body by an overwhelming vote of 386 to 16 on May 2. The purpose of the bill was twofold—to prohibit the imposition of head taxes or gross receipts taxes by airport operators or States, and at the same time to increase the Federal share of funding for airport projects in medium hub and smaller cities to alleviate the problems that these cities have had in coming up with the local share. 119 CONG. REC. 17,344 (1973) (statement of Rep. Devine) (Leg. Hist. App. at 186).

Finally, Mr. President, S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The bill prohibits the levying of State or local head taxes, fees, gross receipts taxes or other such charges either on passengers or on the carriage of such passengers in interstate commerce. 119 CONG. REC. 3349 (1973) (statement of Sen. Cannon) (Leg. Hist. App. at 125-26).

See 119 CONG. REC. 13,899 (1973) (statement of Rep. Kuykendall) (Leg. Hist. App. at 168; quoted in text), 119 CONG. REC. 3348 (1973) (statement of Sen. Cannon) (Leg. Hist. App. at 124; quoted in text).

3. HEARINGS

Particularly dangerous, burdensome, and discriminatory in our judgment is one State's imposition of a tax on the gross receipts derived from the sale of interstate air

transportation—a so-called airlines excise tax. This tax is levied at a rate of 4 percent on airline receipts in that State "for the privilege of engaging in the business of transporting persons or property by air." The revenue derived from this tax is used for projects totally unrelated to aviation. Furthermore, it is levied only on airlines. Airlines pay all other taxes generally applicable to business in the State, and yet they and their passengers are being singled out as an easy source of revenue, whether or not airline operations in the State are profitable, and regardless of their general tax burden. Thus, Pandora's box has been opened to another form of discriminatory taxation on air transportation which, if allowed to proliferate in a myriad of possible forms, could deal a severe financial blow to air travelers as well as the airlines.

. . . .

A more important point, possibly a more basic point, is the discriminatory character of such taxes. Of course, a common characteristic of this tax and the head tax is their discriminatory nature. Either tax, if enacted throughout the country would impose additional financial burdens on air travelers, who are already paying Federal taxes which were established when it was widely assumed that such State and local taxes could not be constitutionally imposed. Both seem to be convenient vehicles for unwarranted taxation of air travelers and air commerce for nonaviation purposes, or for projects which do not necessarily benefit the airports where users are taxed. These taxes can easily be escalated, and if allowed to go unchecked, pose a hazard of disrupting the national system ultimately. The best way to avoid this is to prohibit these taxes again, as you did in the bill which you passed last session. No State or locality which would seek to levy these taxes for nonaviation purposes has a legitimate claim to them. In those cases where communities are relying on head taxes to provide the revenue needed to fund airport improvements, it should not be necessary since as you recognized last year, the airport program can be adjusted to make the user charge revenues in the trust fund more available to the communities who need assistance. *Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182 and S.38 Before the*

Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. 96 (Mar. 14, 15, 20, 22, & 27, 1973) (statement of Stuart G. Tipton, Chairman, Air Transportation Assn. of America) (Leg. Hist. App. at 135, 137).

> In addition to the "head tax" on airline passengers, a new and even more dangerous concept has now appeared—the "gross receipts" tax on airline revenues. Unless Congress acts promptly and effectively, these burdensome taxes will continue to proliferate, and will cause serious economic injury to the air transport industry and its users. *Id.* at 101-03 (statement of Edward J. Driscoll, President, National Air Carriers Assn.) (Mr. Driscoll's testimony is omitted from Leg. Hist. App., although his name is referenced therein at 141).

See id. at 246 (statement of Theodore Koetz, Deputy Tax Commissioner, State of Ohio) (Leg. Hist. App. at 146-48, 151, 153); *id.* at 260 (statement of John A. Nammack, Exec. V.P., Nat'l Assn. of State Aviation Officials) (Leg. Hist. App. at 157).

Other portions of the legislative history evidence an intent to prohibit a broad category of state taxes through enactment of 49 U.S.C. § 1513. *See* 118 CONG. REC. 27,812-29 (1972) (Leg. Hist. App. at 78-79); Op. Br. at 22-24; J.S. at 13-17.